Petition

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No. 81-347

In the Supreme Court of the United States

OCTOBER TERM, 1981

STATE OF MICHIGAN, PETITIONER,

vs.

THOMAS LEE DUGAN, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MICHIGAN

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QUESTION PRESENTED

DOES THE FOURTH AMENDMENT REQUIRE SUPPRESSION OF SEIZED EVIDENCE WHERE THE POLICE OFFICER, POSSESSING PROBABLE CAUSE, MAKES A BRIEF ENTRY INTO PRIVATE PREMISES BASED ON THE REASONABLE AND GOOD FAITH BELIEF HIS WARRANTLESS ENTRY IS JUSTIFIED BY EXIGENT CIRCUMSTANCES AND WHERE THIS "IMPROPER" CONDUCT WAS NOT THE "BUT FOR" CAUSE FOR THE SEIZURE OF THE EVIDENCE?

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In the Supreme Court of the United States

OCTOBER TERM, 1981

STATE OF MICHIGAN, PETITIONER,

vs.

THOMAS LEE DUGAN, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MICHIGAN

NOW COMES William L. Cahalan, Prosecuting Attorney in and for the County of Wayne, State of Michigan, by Edward Reilly Wilson III, Principal Attorney, Appeals, and Anne B. Wetherholt, Assistant Prosecuting Attorney, and prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals of the State of Michigan entered in the above-entitled cause on December 16, 1980. The judgment of the Court of Appeals was affirmed by the Michigan Supreme Court on June 26, 1981.

OPINIONS BELOW

The Michigan Court of Appeals in an opinion issued December 16, 1980 reversed respondent Dugan's conviction on

the ground that his Fourth Amendment right against an illegal search and seizure was violated. This opinion is appended as Appendix A. On June 26, 1981, the Michigan Supreme Court denied a delayed application for leave to appeal. This opinion is appended as Appendix B.

STATEMENT OF JURISDICTION

The opinion of the Michigan Court of Appeals was issued December 16, 1980. The Michigan Supreme Court denied a delayed application for leave to appeal on June 26, 1981. The jurisdiction of this Court is invoked under 28 USC § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF FACTS

Defendant was charged with receiving or concealing stolen property worth over $100.00, MCL 750.535. The examining magistrate bound him over for trial on February 16, 1978. A motion to suppress the evidence was denied by the trial court on March 16, 1978.

The facts show that on the morning of January 29, 1978, complainant noticed that his snowblower was missing from his garage at about 7:45 a.m. He followed the undisturbed snowblower tracks in the fresh snow into an alley. The tracks then led from the alley through an open fence into a garage at the rear of a yard a few blocks away. Upon being informed of this, the lone responding officer followed the tracks, which led directly to the alley behind defendant's garage, and saw the tracks lead into the garage. He also noticed a single set of footprints lead from the garage up to the front of the house. The officer entered the yard from the alley. He went inside the open garage and found that the only snowblower in there bore the serial number of the stolen machine. However, he did not seize the evidence. Rather, the officer then exited the property through the rear fence and walked along public property from the alley around to the front of the house. From the sidewalk in front of the house he was able to watch both the door of the house and the open garage while waiting for backup officers to arrive.

While he was standing on the sidewalk waiting for other officers to arrive, defendant rushed out of the house saying he was going to get "his snowblower." The officer entered onto the premises to prevent defendant and his brother from destroying evidence by obliterating the tracks in the snow, which they were in the process of doing, and removing the snowblower or destroying its identifying characteristics.

Despite its recognition that "[a] trial court's ruling on a motion to suppress will not be disturbed unless clearly erroneous" and that a finding is not clearly erroneous unless "although there is evidence to support it, the reviewing court is left with the firm conviction that a mistake was made," two members of the Court of Appeals ruled that defendant's Fourth Amendment rights were violated and that the trial court erred by not granting the motion to suppress. The Michigan Supreme Court denied a delayed application for leave to appeal.

REASON FOR GRANTING THE WRIT

Petitioner believes that the judicially created exclusionary rule should not be applied where the police officer had probable cause to believe a private garage contained stolen property, where he acted reasonably in making a brief, minimal warrantless intrusion into the garage believing his entry was justified by exigent circumstances, and where the ultimate seizure of the stolen property was not the "fruit" of any improper conduct.

The facts of the instant case reveal that on the morning of January 29, 1978, complainant noticed that his snowblower was missing from his garage at about 7:45 a.m. He followed the undisturbed snowblower tracks in the fresh snow into an alley. The tracks then led from the alley through an open fence into a garage at the rear of the yard a few blocks away. Upon being informed of this, the lone responding officer followed the tracks, which led directly to the alley behind defendant's garage, and saw the tracks lead into the garage. He also noticed a single set of footprints lead from the garage up to the front of the house. The officer entered the yard from the alley. He went inside the open garage and found that the only snowblower in there bore the serial number of the stolen

machine. However, he did not seize the evidence. Rather, the officer then exited the property through the rear fence and walked along public property from the alley around to the front of the house. From the sidewalk in front of the house he was able to watch both the door of the house and the open garage while waiting for backup officers to arrive.

While he was standing on the sidewalk waiting for other officers to arrive, defendant rushed out of the house saying he was going to get "his snowblower." The officer entered onto the premises to prevent defendant and his brother from destroying evidence by obliterating the tracks in the snow, which they were in the process of doing, and from removing the snowblower or destroying its identifying characteristics.

At least two members of the Michigan Court of Appeals panel found that the officer *had probable cause* while standing *outside* the private property to believe the stolen snowblower was inside the garage. The panel disagreed over whether there were exigent circumstances to justify entry onto the private property and into the garage to compare the serial number of the stolen snowblower with the one he found in the garage, one member holding there were exigent circumstances, another holding there were not since removal of the snowblower was not an immediate threat. The other panel member held the suppression was necessary because the ultimate seizure of the evidence was the "fruit" of the earlier illegal search.

The Fourth Amendment requires a showing of probable cause prior to the issuance of a search warrant. Additionally, this Court has said that warrantless searches even if based on probable cause are per se unreasonable subject only to a few specifically established, well-delineated exceptions based on the exigencies of certain particular situations. *Coolidge* v *New Hampshire,* 403 US 443, 474-475, 91 S Ct 2022, 29 L Ed 2d 564, 588 (1971); *Katz* v *United* 389 US 347, 357, 88 S Ct 507,

19 L Ed 2d 576, 585 (1967). In determining the existence of probable cause and the applicability of any exception to the warrant requirement, the reviewing court must make an objective assessment of the officer's actions in light of the facts and circumstances then known to him. *Scott* v *United States,* 436 US 128, 136-137 98 S Ct 1717, 56 L Ed 2d 168, 177 (1978). Unfortunately, even reasonable judges can differ, see Mr. Justice White's dissent in *Stone* v *Powell,* 428 US 465, 539-540, 96 S Ct 3037, 49 L Ed 2d 1067 (1976), thereby causing harm to the administration of justice and the interests of society by excluding relevant and probative inculpatory evidence and by dismissing criminal cases against clearly guilty persons.

The judicially created exclusionary rule should not extend so far. The rule is not, and should not be, coextensive with the Fourth Amendment, *United States* v *Williams,* 622 F 2d 830, 841 (5th Cir 1980), since "[t]he language of the Amendment itself proscribes only 'unreasonable' searches and seizures." *Scott* v *United States, supra* at 136-137. Moveover, the prime purpose of the judicially-created exclusionary rule is to deter future unlawful police conduct; it is not a personal constitutional right of the party aggrieved. *United States* v *Calandra,* 414 US 338, 347-348, 94 S Ct 613, 38 L Ed 2d 561, 571 (1974); *Stone* v *Powell, supra* at 486.

> Despite its broad deterrent purpose, the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons. As with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served. *United States* v *Calandra, supra* at 348.

Accordingly, a determination of whether to employ the exclusionary rule requires a balancing of competing policies. *Stone* v *Powell, supra* at 488. In *United States* v *Peltier,* 422 US 531,

539, 95 S Ct 2313, 45 L Ed 2d 374 (1975), this Court, citing *Michigan* v *Tucker*, 417 US 433, 447, 94 S Ct 2354, 41 L Ed 2d 182 (1974), said:

> "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. *Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force.*" (Emphasis added)

The Fifth Circuit Court of Appeals, sitting *en banc*, recently adopted a good faith exception to the exclusionary rule in *United States* v *Williams*, 622 F2d 830 (5th Cir 1980), quoting Mr. Justice White's criticism of the rule in his dissent in *Stone* v *Powell:*

> When law enforcement personnel have acted mistakenly, but in good faith and on reasonable grounds, and yet the evidence they have seized is later excluded, the exclusion can have no deterrent effect. The officers, if they do their duty, will act in similar fashion in similar circumstances in the future; and the only consequence of the rule as presently administered is that unimpeachable and probative evidence is kept from the trier of fact and the truth-finding function of proceedings is substantially impaired or a trial totally aborted.
> 622 F2d at 842.

Petitioner believes such an exception should have been applied to the case at bar. In the instant case, the officer, while not in hot pursuit of the snowblower thief, was hot on the trail of the fresh snowblower tracks left in the newly-fallen snow. Upon seeing the tracks lead into a garage, the lone officer,

who had probable cause to believe the snowblower was inside the garage, had two choices. One was to go around to the front of the home to watch the house and garage while waiting for a backup crew to arrive to protect the scene so he could leave to obtain a search warrant. The Michigan Court of Appeals panel ruled this would have been the proper course of action. However, petitioner contends that the officer reasonably and in good faith made a different choice believing there were exigent circumstances justifying his immediate entry into the garage before he went around to the front of the house to protect the scene: although he saw the snowblower tracks lead into the garage and had probable cause to believe it was in there, it may in fact have been removed through another exit he could not see, or by someone carrying it, so as to leave no snowblower tracks. If he waited for a backup crew and a search warrant before entering the garage and if the stolen snowblower had indeed been removed, the likelihood increased with the mere passage of time that any remaining trail of tracks and footprints in the fresh snow would be lost forever as people woke up and began going about their daily activities, thereby messing up the snow. At that point there would be little hope of ever catching the thief or recovering the stolen property. Under these circumstances, the officer's quick response to the urgency of the situation, a brief, minimal intrusion, constituted sound police work. He acted under a good faith and reasonable belief that these particular circumstances created an exigency justifying a brief confirmatory search. It is important to note that upon confirming that the stolen snowblower was still in the garage, he *did not seize it,* but rather walked around to the front of the house to await the backup crew.

Judge Clark's earlier dissent, subsequently quoted on rehearing *en banc* in *United States* v *Williams, supra* at 97-98 is equally appropriate to the present facts:

> Since the officer whose future actions are to be affected will not realize his actions are wrongful when he is compelled to make a quick decision in an apparently valid arrest situation which complicated legal analysis may later establish to be invalid, we cannot expect him to be deterred. If today's ruling does serve as any sort of deterrent, it may have the deleterious effect of making the officer on the line overcautious to act in a situation where proper and reasonable instinct tells him that the activity he observes is criminal. If he hesitates to act lest he later be criticized for denying to the process of justice evidence of crime, we have hindered, not furthered, the interests of justice. Unless an officer knows or should know his activities transgress the bounds of law, the evidence discovered by such activity ought not be suppressed.

The instant officer's conduct was reasonable and undertaken in a good faith belief it was justified under circumstances requiring immediate pursuit. It was not the type of police conduct the courts should seek to deter; hence, the exclusionary rule should not have been applied because of this warrantless search.

Nor should the seized evidence be suppressed as the "fruit of the poisonous tree", i.e., the earlier entry which the Michigan Court of Appeals held to be improper.

In *Wong Sun* v *United States*, 371 US 471, 488-489, 83 S Ct 407, 9 L Ed 2d 441 (1963), the United States Supreme Court said that the exclusionary rule has no application where the government learned of the evidence from an "independent source," citing *Silverthorne Lumber Co* v *United States*, 251 US 385, 392, 40 S Ct 182, 64 L Ed 319 (1920), nor where the lawless conduct of the police and the discovery of the challenged evidence has "become so attenuated as to dissipate the taint," citing *Nardone* v *United States*, 308 US 338, 341, 60 S Ct 266, 84 L Ed 307 (1939).

The instant case falls under the *Silverthorne* analysis.[1] Probable cause for a search was obtained from a *prior independent* and *untainted source* — from following the snowblower's tracks in the fresh snow from complainant's garage and while standing outside defendant's premises a few blocks away, watching the snowblower tracks lead into the garage. A subsequent illegal entry onto the premises would *not* vitiate this probable cause, and if the officer had left the scene to seek a search warrant, it would have been granted based on a showing of probable cause from the independent untainted evidence despite the fact that there had also been a *subsequent* acquisition of tainted evidence resulting from a later illegal intrusion. This conclusion has been reached by numerous federal courts.

In *James* v *United States*, 418 F2d 1150 (DC Cir, 969), a suspicious police officer noticed a brand new car sitting around several days in an alley garage. The car had been stripped bare and its front license plate had been removed. He subsequently entered the garage and wrote down the rear license plate number. A check revealed that the car had been reported stolen. A search warrant was then obtained. The court said at page 1151-1152:

> When an affidavit in support of a search warrant contains information which is in part unlawfully obtained, the validity of a warrant and search depends on whether the untainted information, considered by itself, establishes probable cause for the warrant to issue. *Wong Sun* v *United States*, in announcing the "fruit of the

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[1] It is important to note that here the legal evidence establishing probable cause was discovered *before* any illegality occurred; it is not a situation where evidence necessary to establish probable cause was discovered after the illegality making the question one of attenuation. See *United States* v *Crews*, 445 US 463, 471-472, 100 S Ct 1244, 63 L Ed 2d 537 (1980).

> poisonous tree" doctrine, limited the exclusionary rule to evidence which the police could not trace to some "independent" and lawful source.

Similarly, in *United States* v *Marchand*, 564 F2d 983, 992-995, 1001-1002 (2nd Cir, 1977), *cert den* 434 US 1015, 98 S Ct 732, 54 L Ed 2d 760 (1978), the court held there was probable cause to believe this person they confronted was the one wanted on an arrest warrant *before* the officers conducted an illegal search which disclosed a wallet bearing proof of his identity. The court then questioned whether a subsequent illegal search and seizure could relate back to make a previously legal seizure illegal. In citing numerous other federal cases, including *James* v *United States, supra*, holding that a search warrant based on both legally and illegally obtained information was valid if probable cause was shown by the untainted independent information, the court adhered to the majority view in upholding the denial of a motion to suppress. It concluded that "a violation of the Fourth Amendment should not require exclusion of evidence that was obtainable without it." In addition to the numerous cases cited in these opinions see also *United States* v *Saitta*, 612 F2d 205, 208 (5th Cir, 1980).

While the United States Supreme Court has not directly addressed this issue, the above view was also expressed in *United States* v *Giordano*, 416 US 505, 554-556, 94 S Ct 1820, 40 L Ed 2d 341, 375-376 (1974). Mr. Justice Powell, in an opinion joined by Chief Justice Burger, Mr. Justice Blackmun and Mr. Justice Rehnquist discussed the "fruit of the poisonous tree" doctrine with regard to a pen register order issued "prior to, and therefore undeniably independent of, the invalid wiretap":

> In its constitutional aspect, the principle is illustrated by *Wong Sun* v *United States*, 371 US 471, 9 L Ed 2d 441, 83 S Ct 407 (1963). It is, in essence, that the derivative taint of illegal activity does not extend to the ends of the

earth but only until it is dissipated by an intervening event. Of course, the presence of an independent source would always suffice.

The independent-source rule has as much vitality in the context of a search warrant as in any other. Thus, for example, unlawfully discovered facts may serve as the basis for a valid search warrant if knowledge of them is obtained from an independent and lawful source. *See, e.g., Anderson* v *United States*, 344 F2d 792 (CA 10, 1965). The obvious and well-established corollary is that the inclusion in an affidavit of indisputably tainted allegations does not necessarily render the resulting warrant invalid. The ultimate inquiry on a motion to suppress evidence seized pursuant to a warrant is not whether the underlying affidavit contained allegations based on illegally obtained evidence, but whether, putting aside all tainted allegations, the independent and lawful information stated in the affidavit suffices to show probable cause. *James* v *United States*, 135 US App DC 314, 315, 418 F2d 1150, 1151 (1969); *United States* v *Sterling*, 369 F2d 799, 802 (CA 3, 1966); *United States* v *Tarrant*, 460 F2d 701, 703-704 (CA 5, 1972); *United States* v *Koonce*, 485 F2d 374, 379 (CA 8, 1973); *Howell* v *Cupp*, 427 F2d 36, 38 (CA 9, 1970); *Chin Kay* v *United States*, 311 F2d 317, 321 (CA 9, 1962). Judge Weinfield aptly stated the point in *United States* v *Epstein*, 240 F Supp 80 (SDNY 1965):

> "There is authority, and none to the contrary, that when a warrant issues upon an affidavit containing both proper and improper grounds, and the proper grounds — considered alone — are more than sufficient to support a finding of probable cause, inclusion of the improper grounds does not vitiate the entire affidavit and invalidate the warrant." *Id*, at 82.

I know of no precedent holding to the contrary.[6]

Footnote 6 cited in the above quotation reads as follows:

> [6] In fact, there are only two cases lending even colorable support to the contrary view. Both are from the Sixth Circuit, and neither can be said to contradict the general proposition stated above. In *United States* v *Langley*, 466 F2d 27 (1972), the court considered the validity of a warrant issued on the basis of information obtained in a previous warrantless search. The court held the prior search valid in large part and affirmed the validity of the warrant for the second search despite the inclusion in the affidavit of allegations based on the unlawful aspects of the first search. Although the case therefore illustrates the principle stated above, the court added the following comment: "It must be emphasized that where such tainted information comprises more than a *very minor portion* of that found in an affidavit supporting a warrant to search, the warrant must be held invalid." *Id*, at 35 (emphasis in original). The other case is *United States* v *Nelson*, 459 F2d 884 (1972), where the affidavit for a search warrant relied on information derived from two prior warrantless searches. Although the court suggested several reasons for suppressing the evidence seized pursuant to the warrant, the principal basis seems to have been the finding that the untainted allegations did not constitute probable cause. Thus neither case contradicts the decisions of the District of Columbia, Third, Fifth, Eighth, and Ninth Circuits cited in the text.

Mr. Justice Powell's view was recognized in *United States* v *Marchand, supra* at 994 and footnote 21, in that court's discussion of and adherence to the majority position. *See also United States* v *Crews, supra*.

Unlike the above cases, no warrant based on both legal and illegal evidence was obtained in the instant case. However,

under the circumstances of the instant case, there was *no time* to get a warrant: while the officer who had legally acquired probable cause to believe the garage contained the stolen snowblower was standing on the sidewalk in front of the house protecting the scene and waiting for other officers to arrive to protect the scene while a warrant was sought (the officer having used public property to walk from the alley around to the front of the house), defendant rushed out of the house saying he "had to get his snowblower" and tried to wipe out the incriminating tracks in the snow. At this point, *before* police support had arrived to allow the officer to get a search warrant which would *inevitably* have resulted in the legal seizure of the snowblower, the lone officer was compelled to enter the property to prevent the destruction of the evidence. It was at this point that the blatant attempts by defendant and his brother to destroy any and all evidence clearly provided exigent circumstances to justify the officer's immediate entry onto the premises to prevent the destruction or alteration of evidence. *United States* v *Rubin*, 474 F2d 262, 268 (3rd Cir, 1973); *United States* v *Blake*, 484 F2d 50 (8th Cir, 1973).

This exigency was *not* the result of the officer's initial entry into the garage; his brief entry into the garage from the alley and quick exit by the same route brought no one out of the house. It was not until after the officer had walked around the alley to the sidewalk in front of the house and had visibly positioned himself in front of the house so as to watch both the house and the garage that defendant rushed out of the house to remove "his snowblower." The officer would have had to stand in front of the house to protect the scene even if he had made no earlier entry because he had to protect the scene until support arrived so that someone could get a search warrant. Hence, the exigency caused by defendant's reaction to an officer standing in front of his house *would have occurred anyway*, even if there had been no earlier entry into the garage, and the officer could then have legally entered the

property and seized the evidence to protect it from immediate destruction or removal. The earlier illegal entry into the garage was not a "but for" cause for the ultimate seizure of the snowblower. *United States* v *Jarvis*, 560 F2d 494, 498 (2nd Cir, 1977), *cert den*, 435 US 934, 98 S Ct 1510, 55 L Ed 2d 532 (1978).

In sum, the exclusionary rule should not be applied where the officer had probable cause to search and acted reasonably and in good faith believing there were exigent circumstances to justify a warrantless search and where the ultimate seizure was not the "fruit of the poisonous tree" because probable cause was derived from an independent source and because the illegal entry was not the "but for" cause for the ultimate seizure.

CONCLUSION

It is respectfully submitted that for the reasons outlined above, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: August 3, 1981

APPENDIX ON APPEAL

APPENDIX A

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v Docket # 50828

THOMAS LEE DUGAN,
Defendant-Appellant.

BEFORE: Bashara, P.J., and N.J. Kaufman and R.M. Maher, JJ.

R.M. MAHER, J.

Defendant was convicted, after a jury trial, of receiving or concealing stolen property over the value of $100. MCL 750.535; MSA 28.803. He was sentenced to a prison term of from 1 to 5 years, and appeals by right.

Defendant raises four issues on appeal, one of which requires reversal. Prior to trial, defendant brought a motion to suppress evidence of the snowblower which was the subject of his troubles with the law. The motion alleged that the snowblower was seized pursuant to a warrantless entry into his garage. The motion was denied. Defendant renewed his motion on the first day of trial, just before the start of the voir dire, but the motion was again denied. Although the record on appeal does not contain the transcript of the suppression hearing, a motion to suppress may be properly based on the testimony given at the preliminary examination. See *People* v *Charles D. Walker*, 385 Mich 565, 573; 189 NW2d 234 (1971), *People* v *Williams*, 368 Mich 494, 499-500; 118

NW2d 391 (1962), *cert den* 373 US 909; 83 S Ct 1297; 10 L Ed 2d 411 (1963), *People* v *Kaigler*, 368 Mich 281, 297-299; 118 NW2d 406 (1962). A trial court's ruling on a motion to suppress will not be disturbed unless clearly erroneous. *People* v *Grimmett*, 97 Mich App 212; ____ NW2d ____ (1980). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with the firm conviction that a mistake was made. *People* v *Goss*, 89 Mich App 598, 601; 280 NW2d 608 (1979).

In the instant case, Officer Gregory Thompson testified that on the morning of January 29, 1978, he contacted Mr. Charles DeBruyne who reported that a snowblower had been taken from his garage. Mr. DeBruyne reported further that he had followed a set of snowblower tracks from his garage, through an alley, to the rear of a house on East Outer Drive. Officer Thompson testified that he then followed the tracks and an accompanying set of footprints to the rear of the house he had been told about, at which point the tracks and footprints continued through a hole in the fence at the rear of the house and into the garage. Officer Thompson then testified that he walked around to the front of the house where he observed a set of footprints leading from the garage to the front door. He then entered onto the property and went to the open garage where he observed a snowblower that matched the description given by Mr. DeBruyne. On checking further, he verified that the serial number on the snowblower matched the serial number given by Mr. DeBruyne. The officer testified that he then returned to the front of the house where he radioed for his sergeant. Shortly thereafter, the defendant exited from the front of the house at which time Officer Thompson asked the defendant to stop and told the defendant that he wanted to talk to him. The defendant replied that if the officer did not have a search warrant he should stay off the property and then headed toward the garage. Officer Thompson again entered onto the property, following the defendant and

ordering him to stop. Officer Thompson asked the defendant where he was going, to which the defendant replied that he was going to the garage to get his snowblower. Officer Thompson then stepped between the defendant and the snowblower. The defendant on several occasions demanded that the officer leave the property unless he had a warrant and the officer replied several times that he did not need a warrant because he had probable cause and was protecting a crime scene. Defendant then went into the house and returned with another young man, who the officer estimated to be between 15 and 17 years of age. Defendant then stated they were going into the garage but Officer Thompson would not allow them to touch the snowblower. The officer had radioed for assistance, which arrived shortly. These officers stayed in the garage while Officer Thompson went to the front of the house to speak with his sergeant, who had also arrived. The sergeant then spoke with the defendant's mother and Officer Thompson loaded the snowblower into a scout car. The defendant was subsequently arrested and charged with receiving or concealing stolen property over the value of $100.

It is uncontested that there was no search warrant in the instant case. Both the Michigan and United States Constitutions protect against unreasonable searches and seizures, Const 1963, art I, §11, US Const, amend IV, and it has been held that a warrantless search and seizure is *per se* unreasonable unless shown to fall within one of the various exceptions to the warrant requirement. *People* v *Whalen*, 390 Mich 672, 677; 213 NW2d 116 (1973). On appeal, the prosecution seeks to justify the search of defendant's garage and the subsequent seizure of the snowblower on the basis of the "exigent circumstances" exception and under the "plain view" doctrine.

The "exigent circumstances" exception provides that when the police have probable cause to believe that a search of a certain place will produce specific evidence of that crime (the

foundation requirements for issuance of a search warrant), there is no need for a warrant if the police also have probable cause to believe that an immediate warrantless search is necessary in order to (1) protect the officers or others, (2) prevent the loss or destruction of evidence, or (3) prevent the escape of the accused. *People* v *Harris*, 95 Mich App 507, 510; 291 NW2d 97 (1980). See *United States* v *Chadwick*, 433 US 1; 97 S Ct 2476; 53 L Ed 2d 538 (1977), *People* v *Plantefaber*, 91 Mich App 764, 770; 283 NW2d 846 (1979). The rationale of the exception is clear; when the police have the probable cause necessary to secure a warrant, but circumstances make it impossible for them to obtain the warrant in time, then it is "reasonable" under the Fourth Amendment to conduct a search and to seize evidence or contraband. See *United States* v *Guidry*, 534 F2d 1220, 1222-1223 (CA 6, 1976).

In addition to the exceptions to the Fourth Amendment's warrant requirement, it has often been held that objects within the "plain view" of a police officer, observed from a place where the officer has a lawful right to be, may be legally seized so long as the officer has probable cause to believe the objects are evidence or implements of a crime. *People* v *Young*, 89 Mich App 753, 757-758; 282 NW2d 211 (1979), *lv den* 407 Mich 877 (1979), *cert den* ____ US ____; 100 S Ct 1313; ____ L Ed 2d ____ (1980). See *Coolidge* v *New Hampshire*, 403 US 443, 464-473; 91 S Ct 2022; 29 L Ed 2d 564 (1971). To come within the plain view doctrine, the discovery must also be inadvertent. If the discovery is anticipated the seizure cannot be justified under the plain view doctrine. *Coolidge* v *New Hampshire, supra*, 470-471, *People* v *Heard*, 65 Mich App 494, 498-499; 237 NW2d 535 (1975), *lv den* 396 Mich 827 (1976). The plain view doctrine allows such seizures because, as a matter of Fourth Amendment law, no "search" has taken place when the objects are observed by the police from a place in which they have the right to be. *People* v

Ridgeway, 74 Mich App 306, 311; 253 NW2d 743 (1977), *lv den* 401 Mich 831 (1977).

Under the facts and circumstances of the instant case neither exigent circumstances nor plain view can be used to justify the search of defendant's garage and the subsequent seizure of the snowblower. When Officer Thompson arrived at the rear of defendant's property he undoubtedly had probable cause to believe that a crime had been committed and that the snowblower, the evidence of the crime, could be found on defendant's property. At this juncture he should have sought a search warrant for the premises. The prosecution argues, however, that exigent circumstance arose when the defendant exited his house and headed for the garage. This argument ignores the fact that at the time defendant headed for the garage Officer Thompson had already entered onto the property and conducted a search of the garage. There were no exigent circumstances at the time this search was conducted and the subsequent exigency may well have been the product of the first illegal entry. Probable cause, no matter how strong, does not alone justify a warrantless intrusion onto private property. If the officer had at the outset requested a search warrant and remained outside the property until it arrived a warrantless search might then have been justified by exigent circumstances if defendant attempted to remove the snowblower. Because no such exigency existed at the time of the search in the instant case, however, the search and subsequent seizure of the snowblower cannot be justified on these grounds.[1]

---

[1] To the extent that both the dissenting and concurring opinions suggest that exigent circumstances arose from the mere fact that the object to be seized was a snowblower, they are in error. The Supreme Court has held that a motor vehicle, stopped on a

continued on next page

The prosecution's alternative basis for seeking to uphold the search and seizure, the plain view doctrine, is also inapplicable under the facts and circumstances of the instant case. Although Officer Thompson clearly had probable cause to believe the snowblower was evidence of a crime, at the time he observed the snowblower he was not legally in a place he had a right to be. Defendant had a reasonable expectation of privacy in the land surrounding his house and in his garage, and, accordingly, was entitled to be free from unreasonable governmental intrusion into these areas. *United States* v *Dionisio*, 410 US 1, 8; 93 S Ct 764; 35 L Ed 2d 67 (1973), *People* v *Whalen, supra*, 677. There was no testimony to indicate

---

Continued from previous page

highway, may present the police with exigent circumstances to search the vehicle because of the inherently mobile nature of such a vehicle. See *Chambers* v *Maroney*, 399 US 42; 90 S Ct 1975; 26 L Ed 2d 419 (1970), *Carroll* v *United States*, 267 US 132; 45 S Ct 280; 69 L Ed 543 (1925). The so-called "automobile exception" (actually one form of "exigent circumstances") is in fact a rather limited rule and has no application in a setting such as that before us now. Indeed, the exception has been held inapplicable to a car parked in a private driveway when there was no indication that the car was about to be moved. *Coolidge* v *New Hampshire*, 403 US 443; 91 S Ct 2022; 29 L Ed 2d 564 (1971). *Coolidge* instructs that the critical factor in cases such as this is *not* the ease with which the evidence may be removed. If that were the case a warrant would almost never be required since narcotics, stolen jewelry, weapons, and most other items which would conceivably be the object of a search are as capable of being easily removed as a snowblower could ever be. See *Coolidge* v *New Hampshire, supra*, footnote 18. The key is instead whether an actual attempt to remove the evidence is made. At the time of the search in the instant case no such attempt had been made, and, accordingly, no exigency yet existed. The exigency which ultimately arose in the instant case more than likely resulted from the illegal search. The subsequent exigency does not, therefore, render the original illegal search lawful.

the snowblower could be seen from outside of defendant's property. In the absence of a warrant, consent, exigent circumstances, or some other circumstance rendering the intrusion reasonable, the officer was not entitled to be where he was when the snowblower was discovered. Alternatively, the discovery of the snowblower cannot be considered inadvertent. It is clear that when Officer Thompson arrived at the East Outer Drive address he was looking for the missing snowblower and that when he entered onto the defendant's lands he anticipated finding the snowblower in the garage to which the tracks led. Accordingly, seizure of the snowblower cannot be justified on the basis of the plain view doctrine.

Because we are left with a definite and firm conviction that a mistake was made, we find the trial court's refusal to suppress the evidence clearly erroneous. Because the evidence was seized as the result of an illegal search, the evidence should have been suppressed. *Mapp* v *Ohio*, 367 US 643; 81 S Ct 1684; 6 L Ed 2d 1081 (1961), *People* v *White*, 392 Mich 404, 411; 221 NW2d 357 (1974), *cert den* 420 US 912; 95 S Ct 835; 42 L Ed 2d 843 (1975).

Reversed.

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v No. 50828

THOMAS LEE DUGAN,
Defendant-Appellant.

BEFORE: Bashara, P.J., and N.J. Kaufman and R.M. Maher, JJ.

N.J. KAUFMAN, J. (Concurring)

I am concurring separately, because I want to stress that I am not giving lip service to anything but what I deem to be the law. The dissenting opinion bases part of its conclusion on the fact that the serial numbers on the allegedly stolen snow blower were the same numbers reported by complainant. This is true; however, the dissent does not discuss the fact that the police officer entered the garage for the purpose of checking this serial number. It is this part of the search which provided the officer with most of his probable cause. I do not know a great deal about snow blowers, but I assume that they all look pretty much alike. I do agree with Judge Bashara that once the police saw the identity of the numbers, exigent circumstances existed. However, this does not alter my conclusion that there was initially insufficient probable cause for the search. *Wong Sun* v *United States*, 371 US 471; 83 S Ct 407; 9 L Ed 2d 441 (1963).

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v No. 50828

THOMAS LEE DUGAN,
Defendant-Appellant.

BEFORE: Bashara, P.J., Kaufman and Maher, JJ.
BASHARA, J. (Dissenting)

I respectfully dissent. The facts, even as set forth in the majority opinion, leave me with the firm conclusion that exigent circumstances existed. The complaining witness and a police officer appeared at the edge of defendant's property, following snowblower tracks leading from complainant's property to defendant's. Once there, clearly with probable cause, the officer proceeded on to defendant's property where the snowblower, which matched the description given by the complainant, was spotted in plain view in defendant's garage.

To say that the police officer must retreat and obtain a warrant flies in the face of reason. A snowblower is capable of being easily removed. It matched the description and serial numbers given by the complainant. When the defendant indicated that he was going to get *his* snowblower, logic dictates that had the officer not confiscated the snowblower, it would surely have vanished. I would affirm on that ground alone.

However, the majority is careful to indicate that a trial court's ruling on a motion to suppress evidence will not be overturned unless clearly erroneous, citing *People* v *Grim-*

mett, supra. At the least, the question is close. In overruling the holding of both the magistrate and the trial court, the majority is giving lip service rather than substance to the long-established rule.

I would affirm the defendant's conviction.

APPENDIX B

ORDER OF MICHIGAN SUPREME COURT
(Entered June 26, 1981)

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 26th day of June in the year of our Lord one thousand nine hundred and eighty one.

Present the Honorable
MARY S. COLEMAN,
Chief Justice

CR 33-199

THOMAS GILES KAVANAGH,
G. MENNEN WILLIAMS,
CHARLES L. LEVIN,
JOHN W. FITZGERALD,
JAMES L. RYAN,
BLAIR MOODY, JR.,
Associate Justices

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellant,

vs.

SC: 66890
COA: 50828
LC: 78-00606

THOMAS LEE DUGAN,
Defendant-Appellee.

On order of the Court, the delayed application for leave to appeal is considered, and it is DENIED, because the Court is not persuaded that the question presented should be reviewed by this Court.

0610

STATE OF MICHIGAN — ss.

I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 26th day of June in the year of our Lord one thousand nine hundred and eighty one.

(Seal)

/s/ Jacqueline B. Morse
Deputy Clerk

Opposition

RECEIVED
DEC 28 1981
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SUPREME COURT, U.S.

SUPREME COURT OF THE UNITED STATES

STATE OF MICHIGAN

v

THOMAS LEE DUGAN No 81-347

MOTION TO PROCEED IN FORMIS PAUPERIS

Now comes Thomas Lee Dugan, by his court-appointed attorney, George C Dovas, and prays this Honorable Court to allow this respondent to proceed in formis pauperis for the following reasons, to wit:

1. The State of Michigan has filed a Petition for a Writ of Certiorari
2. This respondent is indigent and the attorney of record in the lower courts is court-appointed.
3. Respondent, through his attorney, is submitting an answer to the Petition for the Writ.

WHEREFORE, Respondent prays this Honorable Court to allow him to proceed in formis pauperis and to DENY the Petition for a Writ of Certiorari.

George Dovas

GEORGE C DOVAS (P-12915)
19400 W. 10 Mile Suite 208
Southfield, Michigan 48075
313-352-8810

SUPREME COURT OF THE UNITED STATES

STATE OF MICHIGAN

v

THOMAS LEE DUGAN No 81-347

AFFIDAVIT IN SUPIORT OF MOTION TO PROCEED
ON APPEAL IN FORMA PAUPERIS

STATE OF MICHIGAN)
COUNTY OF OAKLAND)

Now comes George C Dovas, being duly sworn and says:

1. That he was the attorney of record in the Michigan courts and was court-appointed, see attached appointment

2. That the repsondent, Mr. Dugan, is indigent.

George Dovas

GEORGE C DOVAS (P-12915)
19400 W. 10 Mile Suite 208
Southfield, Michigan 48075

Subscribed and sworn to before me this
13th day of November, 1981.

Barbara V Pruszynski

Notary Public, Wayne County, Michigan
(Acting in Oakland County)]
BARBARA V. PRUSZYNSKI
My Commission expires: January 24, 1984

SUPREME COURT OF THE UNITED STATES

STATE OF MICHIGAN

v

THOMAS LEE DUGAN No 81-347

PROOF OF SERVICE

STATE OF MICHIGAN
County of Oakland

Barbara Pruszynski, being duly sworn, deposes and says that on November 13, 1981, she did serve one copy of respondent Dugan's Motion to Proceed in Formis Pauperis, Affidavit in Support upon :

Wayne County Prosecutor
Frank Murphy Hall of Justice
1441 St Antoine
Detroit, 48226

by enclosing said documents in an envelope with postage affixed thereto.

Barbara V Pruszynski
Barbara Pruszynski

Subcribed and sworn to before me
this 16th day of November 1981

George Dowas
George Dowas Notary Public
Oakland Co. Commission expires 12-8-82

FJL

RECEIVED
DEC 28 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

STATE OF MICHIGAN

IN THE SUPREME COURT

STATE OF MICHIGAN,

Petitioner,

-vs-

THOMAS LEE DUGAN,

Respondent.
_____/

Supreme Court No. 81 347
Court of Appeals No. 50828
Recorders Court No. 78 00606

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Counsel having filed a Motion to Proceed in Formis Pauperis, and pursuant to Rule 46 and Rule 17, now files this Brief in Opposition to the Petition for Writ of Certiorari.

Counsel accepts the Statement of Jurisdiction and Counstitutional Provisions Involved as stated in Petitioner's Petition.

As to the Statement of Facts, counsel for Respondent does not believe any argument is necessary for the Petition should be denied pursuant to Rule 17.

The answers to Rule 17(a)(b)(c) are all Respondent submits, negative to the thrust and essence of Rule 17.

The case at bar did not merit attentions in the Michigan Supreme Court and no important question of federal law exists to burden this Honorable Court.

Petitioner does not demonstrate where any proviso of Rule 17 applies; hence, the Petition should be denied.

CONCLUSION

It is respectfully submitted that for the reasons

10

set forth, this Petition should be denied.

Respectfully submitted,

GEORGE C. DOVAS (P12915)
18500 West Ten Mile Road
Suite 202
Southfield, Michigan 48075
Telephone: (313) 552-8737

Dated: December 21, 1981.

STATE OF MICHIGAN

IN THE SUPREME COURT

STATE OF MICHIGAN,

Petitioner,

-vs-

THOMAS LEE DUGAN,

Respondent.

Supreme Court No. 81 347
Court of Appeals No. 50828
Recorders Court No. 78 00606

PROOF OF SERVICE

STATE OF MICHIGAN)
) SS.
COUNTY OF OAKLAND)

DIANA KLEIN, being first duly sworn, deposes and says that she is employed by the law offices of GEORGE C. DOVAS, and that she did on the 21st day of December, 1981 serve a true copy of BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI upon Edward Reilly Wilson, III, Esq., 1441 St. Antoine, Frank Murphy Hall of Justice, Detroit, Michigan by placing said copy in an envelope, properly addressed and deposited in the United States mail with postage fully prepaid.

Diana Klein
DIANA KLEIN

Subscribed and sworn to before me
this 21st day of December, 1981.

George Dovas
NOTARY PUBLIC
Oakland County, Michigan
My Commission Expires: 2/8/82

STATE OF MICHIGAN

IN THE SUPREME COURT

THE PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellant

v

THOMAS LEE DUGAN
Defendant-Appellee

Supreme Ct #_____

Recorders Ct # 78-00606
Court of Appeals # 50828

BRIEF IN SUPPORT OF ANSWER TO DELAYED APPLICATION

FOR LEAVE TO APPEAL

George C Dovas
19400 W. 10 Mile #208
Southfield, Michigan 48075
P-12915

STATE OF MICHIGAN

IN THE SUPREME COURT

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

Supreme Court No.

Court of Appeals No. 50828

THOMAS LEE DUGAN,

Defendant-Appellee,

_____/

GEORGE C. DOVAS (P 12915)
Attorney for Defendant-Appellee

_____

APPELLEE'S BRIEF

ORAL ARGUMENT NOT REQUESTED

GEORGE C. DOVAS (P 12915)
Attorney for Defendant-Appellee
19400 West Ten Mile Road
Suite 208
Southfield Michigan 48075
352-8810

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STATEMENT OF FACTS

This is a criminal case.

The complainant, Charles DeBruyne, testified that on January 29, 1978, he discovered the snowblower missing (51-55) and followed tracks (55) which lead to the back of the third garage (58).

Officer Thompson testified to receiving a police call (4) (4/27/78); and he was given a description of the snowblower (8). Officer Thompson then followed the tracks, into the open garage and observed the snowblower in question (11). He then called for assistance (11).

He then observed the Defendant come out of the house without a jacket (13) and when asked by Thompson to answer some questions; the Defendant is alleged to have said "I'm going in there to get my snowblower" (13).

At trial, defense moved for dismissal because the handwritten notes of the investigation of the scene of the crime were destroyed (29); the motion was denied (37).

The warrant for Mrs. Dugan, the mother of the Defendant, was refused by the prosecutor's office (65).

A motion for directed verdict was denied by the Court (128).

A motion for mistrial based on the prosecutor's closing statements was denied by the Court (239).

The Defendant was found guilty of Receiving and Concealing on May 1, 1978 and sentenced to one (1) to five (5) years.

He appeals of right.

1. DID THE TRIAL COURT ERR IN DENYING MOTION FOR DISMISSAL WHERE THE DESTROYED NOTES CONTAIN SUBSTANTIVE EVIDENCE AS TO ALLEGED ADMISSION BY THE DEFENDANT?

On direct, Officer Thompson, testified that the Defendant said

"I'm going to get my snowblower" (22).

This statement was made while Thompson was in the backyard of the Defendant's home and during the investigation of the larceny as reported by the complainant.

On cross-examination, Officer Thompson admitted "destroying" the handwritten notes (28).

Defense then asked for a dismissal based on the destruction of evidence (29) which was denied by the Court (37).

The Court stated, in denying the Motion,

> "I am satisfied to this extent that what he made at the scene was a rough draft that contained some notes and he has transcribed that into a written or final document." (p. 35)

This statement, respondent submits, taken with the totality of inferential circumstances of the case, amount to a confession by the Defendant.

In People v Dugan, 29 Mich App 76 (1970) the Court reversed the conviction where the admission was "inconclusive", or "garbled" and the very essence of the offense was contained in the statement.

> "In this case the very essence of the offense was precisely what the Defendant said. A missing word or phrase could change ....." (p. 80)

The prosecutor cited People v Rasborough in support of his position. (29); however, respondent submits that Rasborough supports his position when the Court stated:

> "We conclude that the fragmentary notes and the report should be treated as a single record of the events of the day. Neither is complete without the other." (p. 195)

In People v Rodgers, 388 Mich 513 (1972); the Michigan Supreme Court condemned the reading of a written memorandum by a police officer in lieu of his verbal testimony.

Respondent urges this Court to consider the following testimony.

> "THE COURT: These have to do specifically with the statement, is that correct, the two pages?
>
> MR. KIMBER: Yes.
>
> (By Mr. Kimber) Was this the question asked of you:
>
> 'Question: What happened then?
> 'Answer: I asked him where he was going, and he referred he was going to the garage to get a snowblower.
>
> 'Question: Do you mean that he said 'I am going to get my snowblower'?
>
> 'Answer: Quote, unquote.'
>
> You just said here that he said he was going to his garage to get his snowblower, quote, unquote; that's what your notes showed, is that right?
>
> Yes."

Is there a difference between the following statements?

(a). "he was going to the garage to get a snowblower"

or

(b). "I am going to get my snowblower."

The answer is yes. The statement heard by the jury amounted to a confession and denial of the defense motion was reversible error.

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II. DID THE TRIAL COURT ERR IN RESTRICTING CROSS-EXAMINATION BY DEFENSE COUNSEL?

Defense counsel, in cross-examining officer Leon Plowman, attempted to solicit answers why Defendant's mother was not indicted. (99, 100)

The Court then ruled, in sustaining an objection, "that no further reference will be made to the mother" (100).

Further, when counsel attempted to introduce "Additional information" which was a statement on the mother (115); the Court refused inquiry.

The record, made earlier in the trial, brought forth the fact that a warrant was refused for the Defendant's mother (65).

The Michigan Rules of Evidence, MRE 611, state:

> "...(b) Scope of cross-examination. A witness may be cross-examined on any matter relevant to any issue in the case, including credibility. The judge may limit cross-examination with respect to matters not testified to on direct examination."

In People v Jenness, 5 Mich 305 (1858):

> "...In any case where a witness has testified to a fact or transaction, which, standing alone and entirely unconnected with anything which led to or brought it about, would appear in any degree unnatural or improbable in itself, without reference to the facts preceding and inducing the principal transaction, and which, if proved, would render it more natural and probable; such previous facts are not only admissible and relevant, but they constitute a necessary part of such principal transaction--a link in the chain of testimony, without which it would be impossible for the jury, properly, to appreciate the testimony in reference to such principal transaction."

MCLA 768.29 mandates the duty of the judge to control all proceedings during the trial.

In the case at bar, the interest or bias of a witness can never be regarded as collateral, and defense inquiry into why Defendant's mother was not indicted was warranted inasmuch as the item at issue was found in her property.

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In People v Fitzgerald, 204 Mich 365 (1918); the Michigan Supreme Court, in reversing Defendant's conviction, discussed an analogous situation when it stated:

> "We are, therefore, of the opinion that there was no error in the court excluding the testimony with reference to the acquittal of Mary LeSeno on the charge of having received the property from this burglary, the subject-matter of which was not gone into on the direct or redirect examination by the prosecuting attorney."

The opposite exists in the case at bar, where the examination of the fact was brought out earlier in the trial without objection (p. 65).

The trial Court's restrictions on cross-examination clearly hindered the defense posture, and mandates reversal.

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III. DID THE TRIAL COURT ERR IN DENYING A MOTION FOR MISTRIAL FOR IMPROPER PROSECUTORIAL CONDUCT?

In his closing argument, the prosecutor said:

> "We don't have to show that he stole it, only that he had possession of it or concealed it knowing it to have been stolen. He didn't have to steal it.
>
> The People submit that he did steal it because of one set of facts, circumstantial facts pointing to that someone in that house who stole that snowblower. That is a crucial point."

Defense counsel objected (239) and the Court denied a Motion for Mistrial (239).

It is undisputable that the prosecuting attorney has the right to draw inferences for the jury from the facts appearing in the record. People v Morlock, 233 Mich 204.

In the case at bar, the prosecuting attorney accuses the Defendant of "stealing" the item in question; a crime for which the Defendant is not on trial.

This imputation of a major felony unsupported by the facts clearly mandates reversal. People v Caldwell, 78 Mich App 690. People v Cowell, 44 Mich App.623.

IV. DID THE TRIAL COURT ERR IN DENYING THE MOTION TO SUPPRESS?

Prior to trial, defense moved to suppress the evidence and said motion was renewed before the trial Court (3) (4/26). On both occasions, the motion was denied (5) (4/26).

The defense position was that the police officer went on private property, looked into an unlocked garage and seized the stolen property without a warrant.

It is well-settled that "seizure of objects within the plain view of an officer, lawfully in a place where he had a right to be, are not proscribed by the constitution." People v Whalen, 390 Mich 677; People v Kuntze, 371 Mich 419.

In addition, "there must be a prior justification for his intrusion and discovery of the evidence must be inadvertent." People v Harlen, 54 Mich App 353.

As stated in People v White, 392 Mich 404 (1974), 410;

> "To sustain the validity of a warrantless search the burden rests on the people to demonstrate that the police acted in a reasonable manner, based on probable cause and in response to an exigent circumstance bringing the search under one of the specifically established exceptions to the warrant requirement."

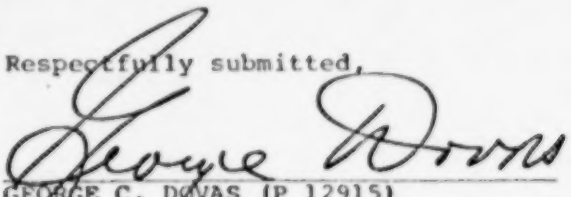
In the case at bar, respondent submits that probable cause cease when the tracks entered private property and a search warrant became mandatory. Depending upon the circumstances, an individual may have a reasonable expectation of privacy in his back yard. People v Hopko, 79 Mich App 611.

Respondent urges this Honorable Court to reverse his conviction based on an illegal seizure.

R E L I E F

WHEREFORE, Defendant-Appellee, prays that this Honorable Court deny the Delayed Application for Leave to Appeal.

Respectfully submitted,



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DATED: April 30, 1981